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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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KEVIN RATLIFF,
Appellant

V.

THE STATE OF TEXAS,
Appellee

Appeal from No. 03-18-00569-CR in the
Third Court of Appeals, Austin
Trial Court No. CR7557
424th Judicial District Court of Llano County, Texas

STATE'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

INDEX OF AUTHORITIES iii

STATEMENT OF THE CASE..... 2

STATEMENT REGARDING ORAL ARGUMENT 2

STATEMENT OF FACTS 3

SUMMARY OF THE ARGUMENT 12

The evidence presented at trial was sufficient to sustain Appellant's convictions for tampering with a governmental document and official oppression

ARGUMENTS & AUTHORITIES.....13

I. Applicable Law Regarding Sufficiency of the Evidence 13

II. Tampering with a Governmental Record 15
a. Elements of the Offense and Relevant Law.....15
b. No Requirement to Prove Legal Duty to Act 16
c. Body Camera Video Does Not Negate Appellant's Guilt 20

III. Official Oppression.....23
a. Elements of the Offense 23
b. Appellant's Conduct was Unlawful.....24
c. Appellant's Actions Were Not Justified by Exigent Circumstances 28
i. Dissipation of Evidence 29
ii. Evading Arrest 31
iii. Hot Pursuit 34
d. Appellant Knew His Actions Were Unlawful.....38
i. *Ross* and *Reynolds*..... 38
ii. Evidence of Appellant's Knowledge 42
e. Conclusion.....48

PRAYER.....50

CERTIFICATE OF COMPLIANCE.....51

CERTIFICATE OF SERVICE.....51

INDEX OF AUTHORITIES

CASES

Adames v. State,
353 S.W.3d 854 (Tex. Crim. App. 2011) 15

Arrington v. State, 589 S.W.3d 196 (Tex. App.—Houston [1st Dist.] 2019, pet. dism'd), *op. withdrawn on appellant's death*, No. 01-17-00859-CR, 2020 Tex. App. LEXIS 3951 (Tex. App.—Houston [1st Dist.], Feb. 11, 2020, order) 35, n.27, n.28, 36

Billingslea v. State,
780 S.W.2d 271 (Tex. Crim. App. 1989) 18

Boracio v. State,
158 S.W.3d 498 (Tex. Crim. App. 2005) 29 n.17

Brigham City v. *Stuart*,
547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) 29

Chambers v. State,
580 S.W.3d 149 (Tex. Crim. App. 2019) 16 n.3

Crain v. State,
315 S.W.3d 43 (Tex. Crim. App. 2010) 32 n.22

Diltz v. State,
172 S.W.3d 681 (Tex. App.—Eastland 2005) 33 n.23

Gilley v. State,
418 S.W.3d 114 (Tex. Crim. App. 2014) 25 n.8, 31 n.20

Hernandez v. State,
577 S.W.3d 361 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd) 16 n.4

Hooper v. State,
214 S.W.3d 9 (Tex. Crim. App. 2007) 14

Jackson v. Virginia,
443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 13

Johnson v. State,
583 S.W.2d 399 (Tex. Crim. App. 1979)..... 45 n.35

Magee v. State,
No. 01-02-00578-CR, 2003 WL 22862644, at *2 (Tex. App.—
Houston [1st Dist.] Dec. 4, 2003, no pet.)
(mem. op., not designated for publication)..... 16 n.4

Malik v. State,
953 S.W.2d 234 (Tex. Crim. App. 1997)..... 15

McNairy v. State,
835 S.W.2d 101 (Tex. Crim. App. 1991)..... 29 n.18

Michigan v. Tyler,
436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978)..... 48

Oler v. State,
998 S.W.2d 363 (Tex. App.—Dallas 1999, pet. ref'd).....17-18

Ransom v. State,
920 S.W.2d 288 (Tex. Crim. App. 1996)..... 45 n.35

Ratliff v. State,
604 S.W.3d 65 (Tex. App.—Austin 2020).....2-3, 19, 25, 38, 42 n.32

Reynolds v. State,
543 S.W.3d 235 (Tex. Crim. App. 2018).....38, 40-41, 42 n. 32, 44, 48

Riley v. California,
134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)..... 41 n.31

Ross v. State,
543 S.W.3d 227 (Tex. Crim. App. 2018).....38-41, 42 n.32, 44, 48

Shepherd v. State,
273 S.W.3d 681 (Tex. Crim. App. 2008) 29 n.16

Silverman v. United States,
365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961) 49

State v. Granville,
423 S.W.3d 399 (Tex. Crim. App. 2014) 41 n.31

State v. Taylor,
32 S.W.3d 702 (Tex. App.—Texarkana 2010, pet. ref'd) 18 n.5

Tate v. State,
550 S.W.3d 410 (Tex. Crim. App. 2016) 14, 34 n.26, 47 n.37

Torres v. State,
794 S.W.2d 596 (Tex. App.—Austin 1990, no pet.) 45 n.35

U.S. v. Mendenhall,
446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) 32 n.22

Waugh v. State,
51 S.W.3d 714 (Tex. App.—Eastland 2001, no pet.) 29 n.19

Welsh v. Wisconsin,
466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) 35

Yeager v. State,
104 S.W.3d 103 (Tex. Crim. App. 2003) 35

Zuniga v. State,
551 S.W.3d 729 (Tex. Crim. App. 2018) 13-15, 34 n.26, 47

STATUTES AND CONSTITUTIONS

Tex. Code Crim. Proc. art. 14.05 ..... 25-26, 28

Tex. Const. Art. I, § 9 ..... 27 n. 13

Tex. Const. Art. I, § 19 ..... 26 n.11

Tex. Pen. Code § 6.01..... 16

Tex. Pen. Code § 30.05..... 28

Tex. Pen. Code § 37.01(2)(A) 15-16

Tex. Pen. Code § 37.10..... 2

Tex. Pen. Code § 37.10(a)(5) 15, 21 n.6

Tex. Pen. Code § 37.10(f)..... 21 n.6

Tex. Pen. Code §38.04..... 31 n. 21

Tex. Pen. Code § 39.03..... 2

Tex. Penal Code §39.03(a)(1) 26 n.9, 27 n.14

Tex. Penal Code §39.03(a)(2) ..... 26 n.10, 27 n. 12

Tex. R. App. P. 38.1(f) ..... 25 n.8, 31 n. 20

Tex. R. App. P. 70.3 1

U.S. Const. Amend. IV ..... 27 n. 13, 39-40, 42-43

U.S. Const. Amend. V 26 n.11

TREATISES

McCormick & Ray, Texas Practice Vol. 2,
Law of Evidence, § 1538, at 242 (1980) ..... 45 n. 35

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Appeal from No. 03-18-00569-CR in the
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424th Judicial District Court of Llano County, Texas

STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW the Appellee, the State of Texas, by and through the 33rd and 424th District Attorney, the Honorable Wiley B. McAfee, and files this brief pursuant to Rule 70.3 of the Texas Rules of Appellate Procedure, and in support thereof would show this Honorable Court as follows:

STATEMENT OF THE CASE

Appellant was charged with two counts of misdemeanor official oppression and one count of state jail felony tampering with a governmental record. *Ratliff v. State*, 604 S.W.3d 65, 69 (Tex. App.—Austin 2020) (citing Tex. Penal Code §§ 37.10, 39.03). The jury found Appellant guilty of both counts of official oppression and the lesser included misdemeanor offense of tampering with a governmental record. *Id*. The trial court assessed Appellant's punishment in each count at confinement for a term of 6 months in county jail, suspended the sentences, and placed Appellant on community supervision for one year. *Id*. The Court of Appeals for the Third District affirmed the district court's judgments of conviction. *Id*. at 89. This Court granted review on Ground No. 1 of Appellant's petition, in which he alleges that the Court of Appeals erred in finding the evidence sufficient to sustain Appellant's convictions.

STATEMENT REGARDING ORAL ARGUMENT

The Court has permitted oral argument, and we respectfully request the opportunity to present oral argument.

STATEMENT OF FACTS

We agree with Appellant that the Court of Appeals' recitation of the facts is generally adequate. *See Ratliff*, 604 S.W.3d at 69-71. However, given the fact-intensive nature of the issue presented, we provide the following detailed narrative supported by record references[1] to assist the Court in its analysis.

On May 2, 2017, Cory Nutt was arrested out of his residence, without a warrant, for the Class C misdemeanor offense of public intoxication. Appellant, who served as the Chief of Police for the City of Llano, Texas, entered Nutt's trailer without consent and against Nutt's expressed wishes, placed a hand on Nutt's back and directed him out of his trailer. Nutt was then handcuffed and transported to the county jail.

On the date of his arrest, Cory Nutt was living out of his travel trailer at the Riverway RV Park in Llano, while he worked on a project as a crew supervisor for the Lower Colorado River Authority ("LCRA"). 5 RR 238-39. After returning to the RV park from work that evening, Nutt had dinner with his neighbor, Alex Britton. 5 RR 209. Nutt and Britton often grilled

[1] In this brief, we cite to the single-volume Clerk's Record as "CR" followed by the relevant page number (e.g., "CR 136"). The multi-volume reporter's record is referenced first by the volume number, followed by "RR" and the page number (e.g., "9 RR 27"). Where applicable, a line number may also be referenced (e.g., "9 RR 27, L. 13").

and ate together in the grassy area between their two adjacent trailers. 5 RR 206-09. Grant Harden, a Llano police officer, also lived at the RV park in a trailer three spaces down from Britton. 5 RR 239-41; 9 RR 34, 71. Nutt knew Harden was a police officer but did not know him personally. 5 RR 239.

After Nutt and Britton ate dinner and had some alcoholic drinks, they talked for a while and went their separate ways around dark. 5 RR 206-09, 227. Shortly thereafter, Nutt walked back to Britton's trailer looking for his cell phone. 5 RR 209. While the two were talking at Britton's door they heard a vehicle accelerating and tires spinning, and saw Harden driving past in his red pickup truck. 5 RR 210-12; 243. Harden, wearing civilian clothing and driving his personal vehicle, was responding to a call for a domestic disturbance at an apartment complex less than a mile from the RV park. 4 RR 50-53, 61-62; 5 RR 53; 9 RR 32, 57.

Nutt testified that he thought Harden was going too fast, which was of concern to Nutt since his six-year-old son typically visited him on weekends and "there's a lot of foot traffic that goes up and down the road." 5 RR 244-45. Nutt shouted at Harden and told him to slow down. 5 RR 211, 243-44. Harden stopped, backed up, rolled down his window, and exchanged heated words with Nutt. 5 RR 212-14, 231, 244. Nutt testified that he asked

Harden if he "thought he was above the law," but could not remember if he had cursed at Harden. 5 RR 244-45. Harden stated in his written report that Nutt yelled at him to "slow the fuck down." 9 RR 6. Harden's report further states that Nutt refused to give his name upon request, that Harden identified himself as a Llano police officer on his way to a call for emergency assistance, and that Harden instructed Nutt to go back inside his RV. 9 RR 6. Alex Britton testified that he didn't remember exactly what was said but the exchange between Nutt and Harden was brief and unfriendly; it ended when Harden said he was on his way to a call and would be back. 5 RR 213-214, 231. After Harden left, Britton helped Nutt find his phone and each went back into his own trailer. 5 RR 214, 247.

Harden responded to the nearby domestic disturbance, along with Llano police officers Jackson Idol and Aimee Shannon, but no arrests were made and Harden was at the apartment complex only briefly before returning to the RV park. 4 RR 50-53, 56, 62. At 10:57 p.m. Harden called Christie Schutte, the manager of the Riverway RV Park, and told her that "a few trailers down from him a guy was irate and upset." 5 RR 172. Harden called out over his radio requesting an additional unit at Riverway RV park, stating that he had a "public intox." 4 RR 63, *See* State's Exhibit 5. In response to the dispatcher's question whether Harden was out with the subject

previously identified as "Cory," Harden responded over the air that Cory "went back in his RV" and Harden was waiting for another unit. 4 RR 63-64; *See* State's Exhibit 5. Jared Latta, Aimee Shannon, and Appellant all responded to the RV park. 5 RR 179.

The precise timing and order of the officers' arrival is disputed, but Officer Shannon's body camera captured approximately the final fourteen minutes of the ensuing confrontation between the officers and Nutt. 9 RR 12-23 (*See* State's Exhibit 2). Throughout the recorded portion of the confrontation, Nutt stood inside the doorway of his trailer, having opened the door in response to Harden's knocking; Nutt was not wearing shoes. 4 RR 46-47. Harden and Shannon repeatedly instructed Nutt to exit his trailer; Nutt repeatedly refused to come out and denied consent for officers to enter. 9 RR 12-23.

Shannon asked Harden whether Nutt had been detained prior to going into his trailer. 9 RR 12. Harden stated that Nutt had not been detained, but "ran inside his trailer and slammed the door" when Harden was getting out of his vehicle. 9 RR 13. Harden made several statements implying that Nutt's failure to comply with the officers' demands would cost him his job

with LCRA. 9 RR 12, 18-19.[2] During a portion of the confrontation, Shannon pointed her taser at Nutt, who remained inside the doorway of his trailer, and Shannon and Harden indicated that Nutt would be tased if he did not comply with their requests to exit the trailer. 9 RR 21. More than ten minutes into the recorded portion of the confrontation, Appellant walked up the steps to Nutt's trailer, moved behind Nutt, placed a hand on Nutt's back, instructed Nutt to step out of the trailer, and directed him out the door and down the steps. 5 RR 255, 9 RR 11 (*See* State's Exhibit 2). While this was occurring, Nutt stated, "I don't wanna (sic) walk outside." 9 RR 21.

Once outside, Nutt was handcuffed. 5 RR 255. Nutt requested that he be cuffed in front of his body but Harden and Latta refused, saying Nutt "lost that opportunity earlier" when he "didn't do what we asked." 5 RR 255-56; 9 RR 22. Nutt was then transported to the jail by Harden. 5 RR 261-62.

At trial, Cory Nutt, Alex Britton, and Christie Schutte each testified regarding his or her recollection of the events that transpired upon Harden's return to the RV park, leading up to Appellant's entry into Nutt's trailer.

Cory Nutt testified that after his initial verbal confrontation with

[2] "If I have to come up there you're going to jail. And you're probably gonna (sic) lose that high paying job you have with LCRA." 9 RR 12. "So if you like wearing that shirt that says LCRA, I suggest you just come down here and start talking. If not, I've got 4 charges on you now. Sorry, 3. And I promise you that when I get off the phone with your supervisor[…y]ou will not[…b]e wearing that shirt anymore." 9 RR 18-19.

Harden, he went back to his trailer, talked briefly to his mother-in-law on the phone, cleaned up dishes, and went to bed. 5 RR 247-48. He was awoken by someone "knocking or beating" on his door "hard enough to wake someone up that would be sleeping." 5 RR 248. Nutt testified that when he opened the door, one of the officers locked or held it open; he saw Aimee Shannon in front of him and heard Harden talking to someone else outside. 5 RR 249-50. Nutt testified that he was not outside when Harden came back to the RV park, he did not run back into his trailer, and did not shout profanities at Harden. 5 RR 250.

Christie Schutte left her home and drove to the RV park after Harden called to tell her about his earlier verbal confrontation with Nutt. 5 RR 172-73. When Schutte arrived shortly after 11:00 p.m., she found Harden standing at the back of Nutt's truck and RV, "running his plates" and communicating with the dispatcher. 5 RR 173-75. No other officers were there. 5 RR 175. Schutte testified that Harden did not seem to be in any kind of chase or emergency. 5 RR 178-79. Cory Nutt was not outside. 5 RR 178. Schutte asked Harden what was wrong and Harden said he was "taking [Nutt] to jail for PI." 5 RR 178. Schutte asked "Where is he at?" *Id*. Harden responded, "He's in his trailer." *Id*. Schutte responded, "Then what's the problem?" *Id*.

Schutte, who knew all the involved officers, testified that Jared Latta arrived and was standing near Harden as Harden knocked on Nutt's door. 5 RR 176, 179. Nutt opened his door. 5 RR 179. Around that time, according to Schutte, Officer Aimee Shannon pulled up and Appellant pulled up "right after" Shannon. 5 RR 177. Schutte testified that the officers were standing in the area in front of Nutt's doorway trying to get him to come out of his trailer, until Appellant "walked around and went in behind him […] And made him come out." 5 RR 182-87.

Alex Britton testified that Nutt returned to his camper after the initial verbal confrontation with Harden. 5 RR 215. Britton was about to go to sleep when he heard repeated knocking. 5 RR 215-16. Britton walked outside and saw police officers knocking on Nutt's door. 5 RR 219. Britton saw Nutt open his door, and witnessed the ensuing confrontation with officers. 5 RR 217-22. Britton could not remember how many officers were there when he first walked out, but remembered that Appellant was standing behind Shannon and Harden while they talked to Nutt, "kind of in the back … just watching everything." 5 RR 217-19. When Shannon pointed her taser at Nutt, Britton voiced his concern to her that it "probably wouldn't be a good idea" to tase Nutt because Nutt had a bad back. 5 RR 221. Britton witnessed Nutt's arrest, and then retrieved Nutt's keys to lock up his trailer.

5 RR 222.

Harden's written report, dated May 3, 2017, contained the following narrative of the events that transpired the night of May 2, 2017:

> 1. On May 2, 2017 at approximately 10:50 p.m., Llano PD Officers Shannon and Idol were answering a call for service at 1100 W Haynie St, Apt. 311 in reference to a physical domestic disturbance. The subject(s) had barricaded themselves inside the residence. When this information went out over the radio, I responded. As I was leaving the Riverway RV Park, located at 1907 W Ranch Road 152, I could hear a male subject yelling. I stopped my vehicle and asked the man if he was alright. The subject yelled at me "slow the fuck down." I immediately noticed the subject to be speaking with slurred speech.
>
> 2. I presented my officer's badge and asked the man his name, which he refused to give. He then asked for my name. I told him that my name was Grant Harden, that I was an officer with the Llano police department and that I was on my way to an officer's call for emergency assistance. The man said something that was unintelligible. I also noticed that the male was staggering heavily as he walked. The male was clearly intoxicated. I told the man to go inside his RV, due to my need to leave the area. I then left.
>
> 3. After providing assistance to Officers Shannon and Idol, I returned to the RV park. I stopped behind the intoxicated male's RV in order to get his license plate number, in an attempt to identify him. I did not see the male and thought he had probably retreated into his RV for the night. The license plate on the RV and the pickup truck parked next to it were both registered to a CORY DON NUTT[.] As soon as I had received this information, Nutt stepped out of the shadows and began speaking to me. I asked him his name, but he refused again. He then said to me "get out of the truck bitch."

4. Given Nutt's slurred speech, inability to walk without staggering and the fact that he had chosen to begin using profane language in a public place, I made the decision that Nutt may be a danger to himself or others. I decided that Nutt was to be arrested for Public Intoxication. I exited my vehicle and requested a patrol unit for assistance.

5. Officer Shannon, Sergeant Jared Latta and Chief Kevin Ratliff arrived on scene a short time later. Ratliff placed Nutt in handcuffs and I notified him that he was under arrest for public intoxication. I transported Nutt to the Llano County Jail and booked him in without further incident.

9 RR 6. Appellant, as Harden's "approving supervisor," signed Harden's report indicating that he approved it. 5 RR 118; 9 RR 4 (*See* State's Exhibit 1).

In December 2017, after his public intoxication charge was dropped, Nutt contacted Jack Schumacher, the chief investigator for the Llano County district attorney's office, to report the circumstances of his arrest. 4 RR 34-35. Schumacher, together with Texas Ranger Marquis Cantu, conducted an investigation that resulted in Appellant's indictment. 4 RR 42. During the investigation, Schumacher and Cantu interviewed Appellant. 9 RR 35-48; *See* State's Exhibit 10, 10T. When asked his basis for going into Nutt's RV, Appellant stated, "I didn't want to see a 300 something pound guy get tased standing in that doorway, and falling face first." 9 RR 41, L.165-66. When asked whether he considered Nutt's arrest to be legal, Appellant stated,

"That's what my understanding was. And I still feel it was a legal arrest. I mean he had no right to run back in the trailer." 9 RR 41, L. 169-70.

SUMMARY OF THE ARGUMENT

The evidence presented at trial was sufficient to sustain Appellant's convictions for tampering with a governmental record and official oppression.

Regarding the conviction for tampering with a governmental record, the State alleged that Appellant committed a punishable "act" (i.e., making, presenting, or using a governmental record with knowledge of its falsity) rather than a mere omission. Therefore, the State was not required to prove that Appellant had a legal duty to include the facts of Nutt's arrest in the offense report – only that Appellant made, presented, or used the report knowing it was false. Since the jury could have concluded beyond a reasonable doubt that Appellant knew the omissions and misrepresentations in Harden's report rendered it false when he approved it, the evidence was sufficient to support his conviction. Furthermore, the fact that Appellant provided the body camera video to prosecutors does not negate any element of the charged offense, and the jury was still entitled to consider Appellant's approval of the false report in concluding that he knew his conduct was unlawful.

Regarding Appellant's convictions for official oppression, the evidence presented was sufficient to support the jury's finding that Appellant arrested Nutt knowing that the arrest was unlawful, and knowingly trespassed on Nutt's residence in the process. The evidence was also sufficient to show that the warrantless entry and arrest was not justified by the need to preserve evidence and was not the product of immediate and continuous pursuit. Finally, the jury heard evidence sufficient to show not only that Appellant's actions in arresting Nutt were unlawful, but also that Appellant knew his actions were unlawful and not justified by exigent circumstances.

ARGUMENT & AUTHORITIES

I. Applicable Law Regarding Sufficiency of the Evidence

When addressing a challenge to the sufficiency of the evidence, the reviewing court considers whether, viewing all the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The jury is the sole judge of the credibility and weight to be attached to the testimony of witnesses, and juries may draw multiple reasonable

inferences from the facts so long as each is supported by the evidence presented at trial. *Tate v. State*, 550 S.W.3d 410, 413 (Tex. Crim. App. 2016). The reviewing court may not re-weigh the evidence or substitute its judgment for that of the factfinder. *Zuniga*, 551 S.W.3d at 732. When the record supports conflicting inferences, the reviewing court presumes that the jury resolved the conflicts in favor of the verdict. *Tate*, 550 S.W.3d at 413.

Although the State must prove that a defendant is guilty beyond a reasonable doubt, the State's burden does not require it to disprove every conceivable alternative to a defendant's guilt. *Id*. at 413. Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Id*. at 13.

In conducting a sufficiency review, the elements of the offense are to be defined by the hypothetically correct jury charge which, for that particular case, accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular

offense for which the defendant was tried. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011) (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment. *Zuniga*, 551 S.W.3d at 733.

II. Tampering with a Governmental Record

a. Elements of the Offense and Relevant Law

A person commits the offense of tampering with a governmental record if they make, present, or use a governmental record with knowledge of its falsity. *See* Tex. Penal Code § 37.10(a)(5). The State alleged in Count III of Appellant's indictment that he "[made or presented or used] a governmental record, namely, a Llano Police offense report, in case number L17-130, by omitting or misrepresenting facts of the arrest of Cory Nutt, and the Defendant made or presented or used the governmental record with knowledge of its falsity." CR 9.

A governmental record is "anything belonging to, received by, or kept by government for information." Tex. Penal Code § 37.01(2)(A). The definition for "governmental record" includes reports beyond those that are

statutorily mandated.[3] *Id*. Texas courts have recognized that offense reports are governmental records as that term is defined in the penal code.[4]

b. No Requirement to Prove Legal Duty to Act

Appellant argues, pursuant to Tex. Penal Code § 6.01, that his failure to include facts and circumstances of Cory Nutt's warrantless arrest in the offense report cannot support his conviction for tampering with a governmental record, because the evidence does not show that he had any statutory or legal duty to include the missing information in the report.

Appellant's analysis fails because his underlying premise - that he was charged with conduct by omission - is flawed. Appellant was charged with conduct by commission, not omission. He was charged with the *act* of making, presenting, or using a Llano Police offense report with knowledge of its falsity. The State alleged he did this "by omitting or misrepresenting facts of the arrest of Cory Nutt," but that language merely supplies evidentiary facts - the manner and means by which appellant was alleged to

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[3] *See Chambers v. State*, 580 S.W.3d 149, 152 (Tex. Crim. App. 2019) ("Can a person commit a crime if he falsifies a governmental record the government was not required by law to keep? Yes. A record kept by the government for information is still a governmental record even if the government was not required to keep it").

[4] *See Hernandez v. State*, 577 S.W.3d 361, 368 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd) (concluding that evidence was sufficient to support determination that offense report was a governmental record); *Magee v. State*, No. 01-02-00578-CR, 2003 WL 22862644, at *2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2003, no pet.) (mem. op., not

have tampered with the offense report. It does not convert the affirmative act of approving a knowingly false offense report into a mere omission.

Appellant's argument is analogous to the one rejected in *Oler v. State*, 998 S.W.2d 363 (Tex. App.—Dallas 1999, pet. ref'd). The defendant in *Oler* was charged with possessing a controlled substance (hydromorphone) by misrepresentation, fraud, forgery, deception, or subterfuge. *Id*. at 365. The indictment alleged that he obtained the controlled substance from four different doctors "without informing each doctor of current and past treatment by the other doctors." *Id*. The defendant claimed that the evidence was not sufficient to support his conviction because the State failed to prove that he had any statutory duty to disclose to his doctors that he was receiving hydromorphone from other sources. *Id*. at 366.

The Fifth Court of Appeals rejected his argument, and explained its reasoning:

> Appellant's charged conduct is the punishable act of possessing or attempting to possess a controlled substance by fraud and deceit. Appellant's conduct in possessing the controlled substance involves a punishable 'act,' not a simple omission. Criminal responsibility for acts does not require an underlying duty of any kind. The method or means by which appellant obtained the controlled substance was by the reporting of incomplete medical history and records to a physician, while

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designated for publication) (explaining that Penal Code's "broad definition of a governmental record…encompasses…police offense detail report[s]").

> concealing the truth about certain material information, with the intent to deceive or mislead the physician into prescribing a controlled substance.

Oler v. State, 998 S.W.2d at 369 (citing *Billingslea v. State*, 780 S.W.2d 271, 275 (Tex. Crim. App. 1989)).

The same analysis controls the present case. Appellant's charged conduct is the act of making, presenting, or using an offense report with knowledge of its falsity. Appellant's conduct therefore involves a punishable "act," not a simple omission, and so his criminal responsibility requires no underlying duty of any kind.[5] The method or means by which Appellant made the knowingly false offense report was by omitting or misrepresenting facts of Nutt's arrest. The state need not prove that Appellant had a separate legal duty to accurately and fully report the facts of an arrest, as long as the evidence is sufficient to support the jury's finding that Appellant knew that the omission or misrepresentation of that information made the report false.

[5] Appellant cites *State v. Taylor*, 32 S.W.3d 702 (Tex. App.—Texarkana 2010, pet. ref'd), for the proposition that "for an omission to be an offense, there must be a corresponding duty to act." Appellant's Brief, p. 24. The defendant in *Taylor* was charged with failing to secure his dog by criminal negligence, which led to an unprovoked attack causing serious bodily injury to another. *Id*. at 704. "Failing to secure [a] dog" is a clear example of conduct by omission, and illustrates perfectly why the rule cited by Appellant does not control the present case involving clear conduct by comission.

As the Third Court of Appeals noted, the jury heard ample evidence from which they could have reasonably inferred that Appellant knew the report was false when he approved it:

> [T]he evidence presented at trial, including the recording from Officer Shannon's body camera, established that Ratliff observed and participated in conduct leading to Nutt's arrest that was not mentioned in the report, and Officer Schumacher and Officer Bujnoth both testified that there were omissions in the offense report and discrepancies between what was in the report and what was captured on the recording from Officer Shannon's body camera. In particular, Officer Schumacher explained that there was no mention of the interaction between Nutt and the officers while he was in his home, that there was no mention of Ratliff entering Nutt's home and escorting Nutt out without a warrant and without consent, and that there were no witnesses listed in the report even though "there were some civilians involved that witnessed the event," including Britton and Schutte, which Schumacher described as a "significant" omission. Officer Bujnoth provided similar testimony. More specifically, she explained that there were disparities between what occurred on the recording and what was listed in the offense report, including not listing any witnesses or mentioning that Officer Shannon pointed her taser at Nutt, which Officer Bujnoth described as a show of force that was required to be disclosed. In fact, Officer Bujnoth related that the omissions and misrepresentations were so great that they qualified as tampering with a governmental record.

See Ratliff, 604 S.W.3d at 74. Bujnoth further testified that the omissions and misrepresentations in the report concealed an obviously illegal arrest, and further testified to her opinion that Appellant's actions fit the elements of criminal trespass. 6 RR 58.

Schumacher further testified that Ratliff signed the report as the supervisor and, therefore, approved the report; Bujnoth explained that by signing the offense report, Ratliff indicated that he read the contents, endorsed the description of the events on the night in question, and used the report to document the event. She further testified that when a police chief signs off or approves an offense report, they use the record to represent the documentation of an event and present it to the District Attorney's office for prosecution of the offense. 6 RR 138. Appellant identified himself as the "approving supervisor" of the offense report, and the jury heard testimony that by signing or initialing the report Appellant indicated the he had read the document and agreed with everything that was in it. 5 RR 118; 6 RR 62.

The jury could therefore have concluded beyond a reasonable doubt, based the evidence of the clear discrepancies between the contents of the report and that facts and circumstances of Nutt's arrest, that Appellant approved the report knowing it was false. The evidence was therefore sufficient to support Appellant's conviction.

c. Body Camera Video Does Not Negate Appellant's Guilt

Appellant argues that he did not conceal or suppress the facts relating to Nutt's arrest since prosecutors were provided with the Llano Police Department's body camera video of the incident; he claims that the Court of

Appeals erred by failing to properly consider that fact in its sufficiency analysis. However, Appellant was charged with making, presenting, or using "a Llano Police offense report…with knowledge of its falsity." 1 CR 9. That charge does not require proof of the broader intent to conceal certain information in all forms, but only with respect to the particular governmental record alleged to have been tampered (in this case, the offense report). Appellant fails to explain how providing the video negates any element of the charged offense.[6]

Furthermore, the Court of Appeals did not err in considering the offense report as potentially probative of Appellant's knowledge that his actions were unlawful, even if the video was also made available to prosecutors. The jury heard testimony from Lisa Bujnoth that an offense report serves a unique function in a criminal prosecution because it is the "first document…that the prosecuting attorney sees in order to determine what charges are appropriate, if any." 6 RR 54. Likewise, Jack Schumacher testified that the District Attorney's office relies on offense reports to

[6] In essence, Appellant seems to argue that the Court of Appeals should have considered the video evidence as probative of the affirmative defense contained in Tex. Penal Code § 37.10(f), which states that "It is a defense to prosecution under subsection…(a)(5) that the false entry or false information could have no effect on the government's purpose for requiring the governmental record." However, the jury was not instructed on the affirmative defense and Appellant did not request it or object to its omission.

determine whether an offense has been committed, and reviews offense reports to ensure that officers did not engage in conduct, lawful or unlawful, that might result in the suppression of evidence. 5 RR 124-25. For this reason, the offense report should be "very comprehensive" and "should include witnesses that may or may not have information, both for the prosecutor and for the defense." 6 RR 54. By contrast, body camera videos are not comprehensive. They depict only a portion of an event as seen from the perspective of the particular officer wearing the camera while it is activated.[7]

While it could be argued that providing the video to prosecutors tended to show that Appellant did not intend to conceal the circumstances of Nutt's arrest, the facts bearing on that question were squarely before the jury. They heard evidence that the body camera video was provided to the prosecutor by the Llano police department and also provided to the district attorney's investigator by Appellant. 5 RR 253-54; 9 RR 36. However, in light of Bujnoth's and Schumacher's testimony, the jury could have

[7] The present case demonstrates why body camera videos are a poor substitute for a comprehensive and accurate offense report. Many facts bearing on the lawfulness of Nutt's arrest are not contained on the video provided to prosecutors in this case, e.g., the initial verbal altercation between Harden and Nutt, the events that transpired upon Harden's return to the RV park (i.e., whether Nutt was outside his trailer, as Harden claimed), the timing of the officers' arrival on scene, the presence and identity of eyewitnesses, etc.

rationally inferred from the evidence that Appellant approved the false report in hopes that his own conduct would be at least initially concealed. Thus, the Court of Appeals did not err in considering the evidence in its sufficiency analysis.

III. Official Oppression

a. Elements of the Offense

Count I of Appellant's indictment alleged that Appellant, acting under color of his employment as a public servant, committed the offense of official oppression in three ways:

> 1. By intentionally subjecting Cory Nutt to arrest that Appellant knew was unlawful;
>
> 2. By intentionally denying or impeding Cory Nutt's right not to be deprived of his liberty without due course of law by detaining, seizing, or arresting Nutt, and Appellant knew that his conduct was unlawful; and
>
> 3. By intentionally denying or impeding Cory Nutt's right to be secure in his person from all unreasonable seizures, by entering Cory Nutt's residence and seizing him without a warrant, and Appellant knew that his conduct was unlawful.

1 CR 7-8.

Count II of Appellant's indictment alleged that Appellant committed the offense of official oppression by intentionally subjecting Cory Nutt to

mistreatment that Appellant knew was unlawful by criminally trespassing upon Cory Nutt's residence. 1 CR 8.

Appellant correctly notes that each allegation in Counts 1 and 2 requires the jury to find beyond a reasonable doubt that Appellant knew his conduct was unlawful. He argues that the court of appeals erred to find the evidence sufficient to sustain the conviction for three reasons:

1. Appellant's actions in arresting Nutt were not unlawful;

2. Exigent circumstances authorized Appellant to enter Nutt's trailer without consent, and;

3. Assuming that Appellant's actions were unlawful, the evidence did not establish that Appellant knew his conduct was unlawful;

b. Appellant's Conduct was Unlawful

Appellant claims that the evidence presented at trial was not sufficient to show that he acted unlawfully when he arrested Nutt out of his residence without a warrant, consent, or exigent circumstances, since those actions were not "criminal or tortious." He claims that the Court of Appeals' opinion supports his argument because its analysis of his sufficiency claim "never states that Appellant violated a criminal statute or committed a tortious act by arresting Nutt." Appellant's Brief, p. 27.

However, Appellant did not argue on direct appeal that his actions were neither criminal nor tortious. This argument was first made in his petition for discretionary review.[8] He instead argued that "the evidence did not establish that he knew that the arrest and entry were unlawful and that the evidence established that his otherwise impermissible conduct was justified by the presence of exigent circumstances and that the entry and arrest were authorized because he observed Nutt commit and offense." *Ratliff*, 604 S.W.3d at 69. In response to those claims, the Court of Appeals held that the evidence was sufficient to show that exigent circumstances did not justify the warrantless entry of Nutt's trailer to effect his arrest, and there was sufficient evidence establishing that Ratliff knew that his actions were unlawful when he took them. *Id*. at 80, 83.

Appellant's current argument is based on a mischaracterization of the indictment. He claims "[t]he State alleged Appellant committed the offense of official oppression by violating Article 14.05 [of the Code of Criminal Procedure]," and "proof that Appellant's actions violated Article 14.05[,] without more, is insufficient to sustain a conviction for official oppression."

[8] The Court of Criminal Appeals does not ordinarily review issues that were not decided by the courts of appeals. *See Gilley v. State*, 418 S.W.3d 114 (Tex. Crim. App. 2014). However, we address the substance of Appellant's claim in an abundance of caution and in light of Tex. R. App. Pro. 38.1(f) ("The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.").

Appellant's Brief, p. 25-26. But the indictment in this cause does not mention Article 14.05 or allege that Appellant entered Nutt's residence without consent or exigent circumstances in violation of that statute.

Instead, Count I alleges that Appellant committed the offense of official oppression in three ways. Paragraph 1 alleges that Appellant "subject[ed] Cory Nutt to arrest that [Appellant] knew was unlawful[.]" This charge tracks the language of the statute for official oppression.[9] Paragraph 2 alleges that Appellant, "knowing his conduct was unlawful, intentionally den[ied] or impede[d] Cory Nutt in the exercise or enjoyment of a right, namely, his right not to be deprived of his liberty without due course of law, by detaining, seizing, and arresting Cory Nutt[.]" This charge tracks the language of the statute[10] and identifies the particular right denied or impeded by Appellant – namely, the right not to be deprived of liberty without due course of law.[11] Paragraph 3 alleges that Appellant denied or impeded Cory

[9] *See* Tex. Penal Code §39.03(a)(1) ("A public servant acting under color of his office or employment commits an offense if he […] intentionally subjects another to […] arrest, detention, search, [or] seizure […] that he knows is unlawful.").

[10] *See* Tex. Penal Code §39.03(a)(2) ("A public servant acting under color of his office or employment commits an offense if he […] intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.").

[11] *See* U.S. Const. Amend. V ("No person shall be […] deprived of life, liberty, or property, without due process of law."); Tex. Const. Art. I, § 19 ("No citizen of this State

Nutt in the exercise of his right "to be secure in his person from all unreasonable seizures, by entering Cory Nutt's residence and seizing him without a warrant[.]" This charge tracks the language of the statute[12] and identifies the particular right denied or impeded by Appellant – namely, the right to be secure in his person from all unreasonable searches and seizures.[13] The trial court instructed the jury as follows: "A citizen of this State has, among other rights, the right: 1. not to be deprived of liberty except by the due course of the law; and 2. To be secure in his person, house, paper and possessions, from all unreasonable seizures or searches." CR 130.

Finally, Count II of the indictment alleged that Appellant subjected Cory Nutt to mistreatment that he knew was unlawful, "namely, criminally trespassing upon Cory Nutt's residence[.]" This charge tracks the language of the statute[14] and specifically alleges that Appellant's mistreatment of Nutt

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shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.").

[12] *See* Tex. Penal Code §39.03(a)(2).

[13] *See* U.S. Const. Amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"); Tex. Const. Art. I, § 9 ("The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches[.]").

[14] *See* Tex. Penal Code §39.03(a)(1) ("A public servant acting under color of his office or employment commits an offense if he […] intentionally subjects another to mistreatment […] that he knows is unlawful.").

was unlawful because he committed the offense of criminal trespass.[15] The trial court's instructions to the jury included definitions relevant to the offense of criminal trespass. CR 129. The instructions also properly defined the term "unlawful" to mean "criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege." CR 127.

Therefore, the Court of Appeals was not required to find that Appellant's "violation of Art. 14.05 was criminal or tortious in nature," but rather that Appellant had subjected Nutt to unlawful arrest, deprived Nutt of his liberty without due course of law, unreasonably seized Nutt without a warrant, or mistreated Nutt by trespassing on his residence, and the evidence was sufficient to support the jury's finding that Appellant knew his conduct was not justified by exigent circumstances. If Appellant knew that his warrantless entry into Nutt's residence and warrantless seizure of Nutt's person were not authorized by consent or exigent circumstances, then they were unlawful.

c. Appellant's Actions Were Not Justified by Exigent Circumstances

Article 14.05 of the Code of Criminal Procedure provides, in pertinent part, that:

[15] *See* Tex. Penal Code § 30.05.

> [A]n officer making an arrest without a warrant may not enter a residence to make an arrest unless: (1) the person who resides in the residence consents to the entry; or (2) exigent circumstances require that the officer making the arrest enter the residence without the consent of the resident or without a warrant.

Circumstances qualify as "exigent" when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape. *Brigham City* v. *Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). Texas courts have likewise found exigent circumstances in situations involving the protection of life,[16] protection of property,[17] preventing destruction of evidence,[18] or "hot pursuit."[19]

i. Dissipation of Evidence

Appellant claims the Court of Appeals erred by failing to address the possibility that he arrested Nutt out of his trailer to preserve evidence, because Harden reported that Nutt committed the offense of public intoxication. However, Appellant did not argue either at trial or on direct

[16] *See Shepherd v. State*, 273 S.W.3d 681 (Tex. Crim. App. 2008) (exigent circumstances justified police entry into defendant's home through front door that, according to 911 call from neighbors, had been standing open for an unusual amount of time).

[17] *See Boracio v. State*, 158 S.W.3d 498 (Tex. Crim. App. 2005) (entry where burglary in progress).

[18] *See McNairy v. State*, 835 S.W.2d 101 (Tex. Crim. App. 1991).

appeal that Nutt's warrantless arrest was necessary to preserve evidence of intoxication, and the claim is unsupported by the record.

The evidence shows that Appellant told Schumacher he arrested Nutt out of his trailer because he "didn't want to see a 300 something pound guy get tased standing in that doorway, and falling face first." 9 RR 41, L. 165. When asked whether he thought the arrest was legal, Appellant said "I mean he had no right to run back in the trailer." 9 RR 41, L. 169-70. Appellant never mentioned any concern over the dissipation of evidence of intoxication. In fact, no additional evidence of Nutt's alleged intoxication was obtained following his warrantless arrest, either through field sobriety testing, the testing of breath or blood for alcohol, or by any other means.

Nevertheless, the jury was instructed that the need to prevent the destruction of evidence is an exigent circumstance that would justify a warrantless entry into a residence, but still found beyond a reasonable doubt that Appellant's conduct was unlawful and not justified by exigent circumstances. In light of the evidence presented, the Court of Appeals did not err in finding the evidence sufficient to support those findings.

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[19] *See Waugh v. State*, 51 S.W.3d 714 (Tex. App.—Eastland 2001, no pet.).

ii. Evading Arrest[20]

Appellant next argues that he was authorized to enter Nutt's residence without a warrant to arrest him for evading arrest or detention "based on Harden's assertion that Nutt evaded arrest"; he claims "there is no dispute about the fact that Officer Harden communicated facts to his fellow officers which established probable cause to arrest Nutt for violating section 38.04."[21] Appellant's Brief, p. 21-22, 31.

We emphatically dispute this claim. The record contains no such assertion by Harden, and he made no statements to Appellant or any other officer that would establish that he had detained or attempted to detain Nutt before he knocked on Nutt's door. When directly asked by Shannon whether he had detained Nutt, Harden answered, "No I couldn't when I opened—he told me he said 'Get out, bitch' and whenever I called for you … whenever I

[20] Appellant did not argue on direct appeal that warrantless entry was justified because he had probable cause to believe Nutt had evaded arrest or detention. Instead, he argued that he would have been justified in arresting Nutt for the felony offense of resisting arrest and that exigent circumstances existed justifying his warrantless entry to "defuse the situation." The Court of Criminal Appeals does not ordinarily review issues that were not decided by the courts of appeals. *See Gilley*, 418 S.W.3d 114. However, we address the substance of Appellant's claim in an abundance of caution and in light of Tex. R. App. Pro. 38.1(f) ("The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.").

[21] *See* Tex. Penal Code § 38.04 ("A person commits an offense if he intentionally flees from a person he knows is a peace officer […] attempting lawfully to arrest or detain him.").

called for you and stepped out … he ran inside and slammed the door." 9 RR 13. Later, while attempting to coax Nutt out of his trailer, Harden stated, "You threatened me to get out of my truck, which I did and you very quickly scurried back into your trailer and shut the door." 9 RR 17. Appellant mischaracterizes this exchange, claiming that Harden "told Shannon that he attempted to detain Nutt," and further claims, without support from the record, that Harden "told his fellow officers that Nutt evaded arrest or detention." Appellant's Brief, p. 32, 34.

In fact, Harden never claimed to have taken any action to attempt to detain Nutt, and he never told any other officer that Nutt had evaded arrest or detention. According to Harden, the only action he took upon returning to the RV park was to call for backup and step out of his vehicle in response to the alleged provocation by Nutt. Harden was not in uniform. He did not activate any police lights or siren. He did not claim to have informed Nutt at any time before Nutt returned to his trailer that Nutt was suspected of having committed any offense or was being detained pending an investigation. He never claimed to have given Nutt any verbal commands or to have made any other show of authority[22] upon returning to the RV park that could

[22] *See Crain v. State*, 315 S.W.3d 43 (Tex. Crim. App. 2010) (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) ("Examples of circumstances that might indicate a seizure…would be the threatening presence of several officers, the

reasonably be considered an attempt to effect Nutt's detention.[23] He did not claim he instructed Nutt to stop where he was, or not to return to his trailer.[24]

Furthermore, when Harden called out over the radio requesting an additional unit, he told the dispatcher Nutt "went back in his RV" but described the nature of the call as a "public intox" – not evading arrest. While standing at Nutt's door, Harden and Shannon mentioned multiple possible charges Nutt could face (resisting arrest, interference with public duties, failure to I.D., and public intoxication), but neither officer ever stated that Nutt was facing a possible charge for evading arrest or detention. Likewise, Harden's offense report also contains no claim that he made any

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display of a weapon by an officer, some physical touching of the person of the citizen, or the *use of language or tone of voice* indicating that compliance with the officer's request might be compelled.").

[23] Appellant notes that Harden claimed he showed Nutt his badge earlier that night when he was leaving the RV park. He then cites *Diltz v. State*, 172 S.W.3d 681 (Tex. App.—Eastland 2005), to argue that a non-uniformed officer's display of his badge can be a show of authority which results in a detention. *Diltz* is distinguishable from the present case. In *Diltz*, a plainclothes officer in an unmarked car was following a suspected intoxicated driver. When the car stopped in the middle of the street, the officer approached, identified himself as a police officer, asked the driver to step out, patted him down, found prohibited weapons and arrested the driver. *Id*. at 683. Clearly, *Diltz* does not support an argument that Harden detained Nutt by merely showing him his badge while responding to the domestic disturbance earlier in the night. Nor could Appellant have reasonably believed, in light of Harden's description of the circumstances in which he had displayed his badge ("I showed you my badge when I was leaving…" 9 RR 17, L. 149), that doing so amounted to a detention from which Nutt then fled.

[24] In fact, Harden's report states that prior to leaving the RV park he told Nutt to go back inside his RV. 9 RR 6. Nothing in Harden's report or anywhere else in the trial record indicates that Nutt was ever instructed to do otherwise before Harden knocked on his door.

effort to detain Nutt prior to the other officers' arrival on scene, and no claim that Nutt evaded arrest or detention.[25]

There is simply no factual basis in the record for any claim that Harden had probable cause to arrest Nutt for evading arrest or detention, or that Harden communicated to the other officers facts sufficient to establish probable cause for that offense. Therefore, the jury could have determined, based on reasonable inferences from the evidence, that Appellant did not think he had probable cause to arrest Nutt for evading arrest or detention,[26] and so the Court of Appeals did not err in finding the evidence sufficient to support his conviction.

iii. Hot Pursuit

[25] The report says that after Harden returned to the RV park, "Nutt stepped out of the shadows and began speaking to me. I asked him his name, but he refused again. He then said to me "get out of the truck bitch. […] Given Nutt's slurred speech, inability to walk without staggering and the fact that he had chosen to begin using profane language in a public place, I made the decision that Nutt may be a danger to himself or others. I decided that Nutt was to be arrested for Public Intoxication. I exited my vehicle and requested a patrol unit for assistance. Officer Shannon, Sergeant Latta and Chief Kevin Ratliff arrived on scene a short time later."

[26] While Appellant told Schumacher he thought the arrest was legal and Nutt "had no right to run back in the trailer," (9 RR 41, L.169-70) the jury was entitled to disbelieve Appellant's self-serving statements in the context of an interview with the District Attorney's investigator, and instead conclude that he knew his actions were unlawful, based on reasonable inferences from the other circumstantial evidence. The reviewing court may not re-weigh the evidence or substitute its judgment for that of the factfinder. *Zuniga*, 551 S.W.3d at 732. When the record supports conflicting inferences, the reviewing court presumes that the jury resolved the conflicts in favor of the verdict. *Tate*, 550 S.W.3d at 413.

Appellant next argues that Nutt's warrantless arrest was justified by the "continuous pursuit" exigency. He cites *Arrington v. State*[27] to argue that since Harden "had probable cause to arrest Nutt at a point in time that he was outside," Nutt "could not avoid an arrest by fleeing into his house." Appellant's Brief, p. 21 (quoting *Arrington*, 589 S.W.3d at 201). But the holding in *Arrington*[28] turns entirely on the trial court's finding that "there was an *immediate and continuous* pursuit" in that case. *Id*. at 201 (emphasis added). This is consistent with *Yeager v. State*, where this Court observed that claims of "hot pursuit" are "unconvincing [where] there was no immediate or continuous pursuit of the [defendant] from the scene of the crime." *Yeager v. State*, 104 S.W.3d 103, 109 (Tex. Crim. App. 2003) (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984)).

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[27] *Arrington v. State*, 589 S.W.3d 196 (Tex. App.—Houston [1st Dist.] 2019, pet. dism'd), *op. withdrawn on appellant's death*, No. 01-17-00859-CR, 2020 Tex. App. LEXIS 3951, WL 619311 (Tex. App.—Houston [1st Dist.], Feb. 11, 2020, order).

[28] The Court of Appeals accurately summarized the facts of *Arrington*. *See Ratliff v. State*, 604 S.W.3d at 78, n.2. Arrington involved an appeal from a trial court's order denying a motion to suppress rather than a challenge to the sufficiency of the evidence, so the court of appeals reviewed the trial court's findings for an abuse of discretion, viewing the evidence in the light most favorable to the ruling that Arrington's arrest was lawful. Furthermore, the Third Court of Appeals' opinion in *Arrington* was withdrawn upon the appellant's death, his appeal permanently abated, and his petition for discretionary review dismissed by this Court. *Arrington v. State*, No. 01-17-00859-CR, 2020 Tex. App. LEXIS 3951 (Tex. App.—Houston [1st Dist.] Feb. 11, 2020).

In *Arrington*, deputies responded to the scene of the offense in progress, made observations establishing reasonable suspicion to detain Arrington for driving while intoxicated, engaged Arrington immediately to prevent him from entering his residence, and took continuous action to place him under arrest before he could evade detention, even though it required incapacitating Arrington *without waiting for backup* to arrive.

By contrast, Nutt's arrest was not the result of an immediate and continuous pursuit, and the evidence is sufficient to support the jury's finding that Appellant knew it was not. The original argument between Harden and Nutt occurred around 10:24 p.m. 4 RR 61-62; 5 RR 13-17. Harden's report states that he told Nutt to go back into his trailer, then left the RV park to respond to another call for emergency assistance. 9 RR 6. Nutt and Britton both testified that they retired to their trailers to go to sleep. 5 RR 215, 247-248. Schutte testified that she arrived at the RV park a few minutes after 11:00 p.m. to find Harden standing at the back of Nutt's truck and trailer communicating with the dispatcher and running Nutt's license plates; no other officers were present, Nutt was not outside and Harden did not appear to have been involved in any chase or emergency. 5 RR 173-79. The other officers arrived sometime after 11:11 p.m., and Appellant entered

Nutt's residence to arrest him at approximately 11:24 p.m.,[29] a full hour after Harden's original observation of Nutt's alleged public intoxication.

Even if Appellant had overheard Harden's claim that Nutt "ran inside and slammed the door" or "scurried back into [his] trailer," the evidence shows that he knew there was no immediate and continuous pursuit of Nutt justifying warrantless entry. When Harden announced to the dispatcher over the air that Nutt "went back in his RV," he simultaneously stated that he intended to wait for another unit before taking any further action. *See* State's Exhibit 5, Part 2. Since Appellant stated to Schumacher that he heard Harden's request for another unit, it can be reasonably inferred that he also heard Harden's statement that he intended to wait for the other officer to arrive rather than pursuing Nutt to make an arrest for public intoxication.[30] 5 RR 8, 81; 9 RR 38; *See* State's Exhibit 5 (Part 1 and Part 2).

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[29] Appellant claims the timeline relied on by the Court of Appeals is unsupported by the record, and claims instead that Harden returned to the RV park only about 23 minutes after his first encounter with Nutt. However, Schumacher testified to discrepancies in the various timestamps contained within the evidence, 4 RR 38-42, and further testified that Harden's report did not reflect the correct time that he left the RV park. 4 RR 48-49. The State offered into evidence a timeline clarifying the actual time that various events occurred. 9 RR 56; State's Exhibit 16. That timeline shows that Harden called the dispatcher while leaving the RV park at 10:24 p.m., called Christie Schutte on his way back to the RV park at 10:57 p.m., and was back at the RV park awaiting another unit at 11:10 p.m. Officer Shannon announced that she was "Code 4" at 11:16 p.m., and State's Exhibit 2 shows that Appellant entered Nutt's residence a little over 8 minutes later.

[30] The record establishes that there were no other communications between Appellant and Harden; prior to his arrival at the RV park, Appellant would have no basis for any belief

Since the evidence is sufficient to support the jury's implicit finding that there was no exigency based on "hot pursuit" and that Appellant knew it, the Court of Appeals did not err in finding the evidence sufficient to support his conviction.

d. Appellant Knew His Actions Were Unlawful

i. *Ross* and *Reynolds*

Appellant argues that, assuming that he unlawfully entered Nutt's residence and arrested him, the State failed to prove he knew his actions were unlawful. Appellant likens the present case to *Ross v. State*, 543 S.W.3d 227 (Tex. Crim. App. 2018) and *Reynolds v. State*, 543 S.W.3d 235 (Tex. Crim. App. 2018). However, as the court below noted, the present case is distinguishable from *Ross* and *Reynolds*. *See Ratliff*, 604 S.W.3d at 82-83.

In *Ross*, the defendant ("Ross"), a CPS investigator, received information that a child had been born at home to a mother who had a previous child removed due to the mother's drug use. *Ross*, 543 S.W.3d at 228-29. Ross obtained a court order specifically granting authority to enlist the help of law enforcement to enter the home and locate the child "by any

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that Nutt had run from Harden, cussed at Harden, threatened Harden, or did anything other than go into his trailer. 5 RR 80.

means necessary," to search "the premises" to locate the newborn child and observe "where the alleged abuse or neglect occurred." *Id.* at 230, 235.

Pursuant to the court order, Ross went to the mother's home with two deputies and another CPS investigator ("Francis"). *Id.* at 231. They forced entry and found a bloodstained mattress in a bedroom, along with a journal and calendar showing that the baby had been born at home. *Id.* Before leaving the home, Ross and the deputies went to the kitchen and searched a crock pot, cabinets, and drawers. *Id.* Francis reported to her supervisor that she believed Ross's search of the kitchen violated department policies because it went beyond looking for the child and was instead an effort to gather evidence of drug use. *Id.* at 231-32. Ross was subsequently charged and convicted of official oppression for subjecting the homeowner to illegal search or seizure that Ross knew was unlawful. *Id.* at 231-33. The court of appeals held that the evidence was sufficient to support the conviction. *Id.* at 233.

In reversing the judgment of the court of appeals, this Court observed that, while the State had offered evidence reflecting Ross's *Fourth Amendment* training, the witnesses who testified to their belief that Ross's actions were improper also admitted that "this was not a typical case" and that "the training materials on the *Fourth Amendment* that were admitted

during the trial did not address this type of fact situation." *Id*. at 235. Furthermore, the Court noted that the order obtained by Ross contained broad language authorizing her to search "the premises" and to observe "where the alleged abuse or neglect occurred;" the Court concluded that "it is possible that abuse and neglect took place throughout the entire home." *Id*. at 235.

This Court then reasoned that "[e]ven if the [training] materials had addressed this situation, that information would not have been sufficient to demonstrate beyond a reasonable doubt that Ross knew that her conduct was unlawful." *Id*. Thus, the evidence of Ross's *Fourth Amendment* training did not control the Court's analysis, because the State's evidence simply could not establish that Ross's actions actually violated the court order permitting her to search the residence.

This Court's analysis in *Reynolds* is remarkably similar. *See Reynolds*, 543 S.W.3d 235. In *Reynolds*, a CPS investigator ("Reynolds") took emergency custody of a juvenile who was reportedly using and dealing methamphetamine, and was found in the home of an unrelated 23-year-old male. *Id*. at 237, 242. Reynolds confiscated the juvenile's cell phone, and CPS subsequently petitioned for and was granted temporary custody of the

juvenile. *Id*. at 237-38. More than a year later Reynolds was charged with official oppression for seizing and searching the cell phone. *Id*. at 238.

In finding the evidence insufficient to show that Reynolds knew her conduct was unlawful, this Court noted that "[t]here is no case law addressing, nor statutory provision specifying, the Department's rights and duties during the brief window of time that the child is in the Department's emergency possession."[31] *Id*. at 242. Thus the extent of Reynolds's training was peripheral to the Court's finding that "[i]t was not unreasonable for Reynolds to believe that she, or anyone in the department acting for her, had authority to confiscate [the juvenile's] cell phone so that [the juvenile] could not use it to engage in self-destructive behavior[.]" *Id*. at 242-43. The law delineating her authority to do so under the circumstances was simply unsettled.

The facts of the present case are nothing like *Ross* or *Reynolds*. As the Third Court of Appeals noted,

> Ratliff was neither acting under the authority of a court order authorizing the effectuation of emergency action by any means necessary nor confronted with an atypical search-and-seizure

[31] Additionally, the court noted that the incident occurred two years before the U.S. Supreme Court decided that a warrant was required to search a cellphone incident to arrest, *Riley v. California*, 134 S. Ct. 2473, 2495, 189 L. Ed. 2d 430 (2014), and two years before this Court held that the "a citizen does not lose his expectation of privacy in the contents of his cell phone merely because that cell phone is being stored in a jail property room." *State v. Granville*, 423 S.W.3d 399 (Tex. Crim. App. 2014).

> circumstance in which evidence of a crime may have been found throughout the home, and Ratliff was not seeking to take Nutt into custody or seize his property under the authority of a statute that did not clearly define what actions were permissible or that had no governing case law setting out the parameters for search and seizure. Instead, in this case, Ratliff was confronted with the situation of evaluating the propriety of a warrantless entry and arrest in light of the language of a statutory provision clearly prohibiting, with certain exceptions, the warrantless arrest of an individual in his home[.]

Ratliff, 604 S.W.3d at 83. Furthermore, the Court need not find that the testimony regarding Appellant's training was sufficient alone to establish his knowledge that his actions were unlawful. As the court below properly noted, "evidence beyond the testimony pertaining to Ratliff's training was presented at trial from which the jury could have determined that Ratliff knew that the arrest of Nutt and the entry into Nutt's home were unlawful." *Id*. at 83.

ii. Evidence of Appellant's Knowledge

First, the State did offer evidence of Appellant's training in the *Fourth Amendment* and the law relating to search and seizure.[32] Lisa Bujnoth[33]

[32] As the Court of Appeals noted, "the Court of Criminal Appeals did not determine that evidence regarding a police officer's or another public servant's training could not be considered when determining whether a defendant was guilty of official oppression in circumstances different from those present in *Ross* and *Reynolds*." *Ratliff*, 604 S.W.3d at 83.

[33] Ms. Bujnoth testified that she was retired from the Houston Police Department where she had been a law enforcement officer for 38 years, serving as a patrol officer, undercover

testified that all law enforcement officers are trained under the U.S. Constitution, the Texas Penal Code, and the Texas Code of Criminal Procedure, and that the Texas Commission on Law Enforcement teaches search and seizure, including updates every two years covering any changes in the law. 6 RR 48. Bujnoth also testified that courses in the *Fourth Amendment* and Texas constitution are primary courses for officers obtaining an Advanced Peace Officer certificate. 6 RR 49. Jack Schumacher testified and the State introduced documentary evidence showing that Appellant had been certified as an Advanced Peace Officer since December of 2008. 5 RR 130; 9 RR 60 (*See* state's Exhibit 19). The evidence also showed that Appellant had completed intermediate and non-intermediate training courses titled "Arrest, Search, and Seizure" in January 2002 and December 2012, along with two courses covering legislative updates in August 2011. 5 RR 132-33; 9 RR 60-65. The evidence showed that Appellant had 1477 training hours over the course of his law enforcement career, including 717 total course hours and additional training as a chief of police. 5 RR 133, 9 RR 60-65.

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narcotics officer, field sergeant, and lieutenant, and where she had conducted investigations into official oppression and spent two years in the Internal Affairs Division investigating police misconduct. 6 RR 35-38.

Appellant's training record is probative of his knowledge of the law in the present case because, in contrast to *Ross* and *Reynolds*, Appellant was required only to apply the well-settled law defining the limited circumstances justifying warrantless entry into a residence to make an arrest in a factual scenario that was not particularly unusual. It is not unreasonable to conclude that an Advanced Peace Officer serving as a chief of police would be familiar with the basic *Fourth Amendment* prohibition against arresting a person out of his or her home for a misdemeanor offense without a warrant, absent exigent circumstances.

However, even without considering the evidence of Appellant's training and experience as a peace officer, the jury could have rationally inferred from other evidence that Appellant knew his conduct was unlawful. Every other officer present for Nutt's arrest conspicuously refrained from entering his trailer to arrest him; Harden and Shannon instead attempted to persuade and coerce Nutt into coming out on his own, even going so far as to threaten him with being tased and with the loss of his employment rather than removing him from the trailer physically. Lisa Bujnoth testified that "[b]y going up and spending…14 minutes…trying to threaten [and] cajole Mr. Nutt out of his trailer," it appears that the officers "knew [Nutt] needed to be in public to be arrested for public intoxication." 6 RR 35. The jury

also could have inferred that the other officers' understood that no exigent circumstances justified their warrantless entry.[34]

Christie Schutte, who knew all the officers by sight and had not been drinking that night, testified that Appellant arrived "right after" Shannon. 5 RR 177. Alex Britton testified that Appellant was "in the back kind of just watching everything." 5 RR 219. The jury could reasonably infer from the fact that Appellant stood by silently during this "standoff" that he also understood that the officers had no lawful basis for warrantless entry.

The Third Court of Appeals rightly noted that the jury could also have determined that Appellant knew his conduct was unlawful based on his attempts to later conceal the circumstances of Nutt's arrest.[35] The evidence shows—and the jury explicitly found in count three—that Appellant

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[34] The State directed the jury's attention to this evidence of Appellant's knowledge in closing argument: "But there are also some facts…that show that he knew the law. One, he had two officers standing outside of that trailer that clearly knew the law because when they're trying to coax, threaten, get Cory Nutt out of his trailer anyway (sic) they can, they knew they couldn't go in there." 7 RR 11.

[35] Evidence indicating a "consciousness of guilt is perhaps one of the strongest kinds of evidence of guilt. *Torres v. State*, 794 S.W.2d 596, 598 (Tex. App.—Austin 1990, no pet.). It is a well-accepted principle that any conduct on the part of a person accused of a crime subsequent to its commission which indicates a consciousness of guilt tends to prove that he committed the act of which he is charged. *Id*. (quoting McCormick & Ray, Texas Practice Vol. 2, *Law of Evidence*, § 1538, at 242 (1980)). Acts that are designed to reduce the likelihood of prosecution or conviction, including attempts to suppress or fabricate evidence, are admissible against an accused because they show a consciousness of guilt. *See Johnson v. State*, 583 S.W.2d 399 (Tex. Crim. App. 1979); *Ransom v. State*, 920 S.W.2d 288 (Tex. Crim. App. 1996).

approved an offense report knowing that it omitted and misrepresented the circumstances of Nutt's arrest. Lisa Bujnoth testified that "if all the elements of the incident had been included in the report it would have been obvious that the arrest was illegal." 6 RR 56-57. Schumacher testified that he could think of no reason why Appellant wouldn't ensure that the details of Nutt's arrest were included in the offense report if he genuinely believed it to be lawful. 5 RR 156.

The State focused on the omissions from the report in closing argument, stating, "[w]hen you look at the video and compare it with the offense report, there is no doubt that there are falsifications through omissions and misrepresentations," and "if it had been lawful, they would have put it in the offense report." 7 RR 14, 36. Therefore, the jury could reasonably infer that Appellant attempted to conceal his own unlawful conduct by knowingly authorizing the omission of those critical facts from the offense report and misrepresenting the circumstances of Nutt's arrest,[36] and that doing so demonstrated consciousness of his own guilt.[37]

[36] This is true whether or not the omissions and misrepresentations in the report constituted a separate criminal offense. In fact, the inference is strengthened by fact that the jury convicted Appellant of the lesser-included misdemeanor offense of tampering with a governmental record *without* finding that he had the intent to harm or defraud Nutt. If Appellant's approval of the report was not motivated by malice toward Nutt, it is more likely that the omissions and misrepresentations were intended to conceal his own conduct.

To be sure, the jury also saw conflicting evidence of Appellant's knowledge, in the form of Appellant's statements to Schumacher that he thought Nutt's arrest was lawful. However, reviewing courts presume that jurors resolve such conflicts in favor of the verdict. *Tate,* 550 S.W.3d at 413. The jury, as the sole judge of the credibility and weight to be given the evidence, was entitled to disbelieve the self-serving statements made by Appellant in the context of an interview with the District Attorney's investigator,[38] and instead conclude that he knew his actions were unlawful, based on reasonable inferences from the other circumstantial evidence. The reviewing court may not re-weigh the evidence or substitute its judgment for that of the factfinder. *Zuniga*, 551 S.W.3d at 732.

Since Appellant's actions in the present case were unlawful, and since the State introduced evidence beyond Appellant's training record from which

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[37] Appellant disputes this, since he provided prosecutors with a copy of the body camera video showing additional details of Nutt's arrest. *See* Appellant's Brief, p. 22-23. As we discussed in Section II.c. above, the jury was nevertheless free, in light of the totality of the evidence presented, to determine that the omissions and misrepresentations in the report were intended to conceal the facts of Appellant's unlawful conduct. When the record supports conflicting inferences, the reviewing court presumes that the jury resolved the conflicts in favor of the verdict. *Tate,* 550 S.W.3d at 413.

[38] When asked directly whether Appellants responses to Schumacher's questions contained in State's Exhibit 10 provided "a snapshot into [Appellant's] brain that evening," Schumacher answered: "No." 4 RR 90.

the jury could conclude that Appellant knew his actions were unlawful, Appellant's reliance on *Ross* and *Reynolds* is misplaced.

e. Conclusion

Finally, we note that exigent circumstances justifying warrantless entry exist only where the circumstances do not permit officers to obtain a warrant. *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978). The record in the present case shows that Appellant had no legitimate, urgent basis for violating the sanctity of Nutt's residence without due course of law. Appellant himself agreed with Schumacher that Nutt's arrest was not necessary – to say nothing of his warrantless arrest.[39] The jury could reasonably infer from that statement alone that Appellant knew on May 2, 2017 that no exigent circumstances justified his actions.

Nutt had allegedly committed the relatively minor offense of public intoxication. He posed no discernable threat to himself or others when Appellant forcibly removed him from his home. He was employed in the community and gave no indication that he intended to escape the reach of ordinary legal process. The decision to remove him forcibly from his residence was not compelled by the circumstances.

[39] Schumacher stated to Appellant, "[I]t seems that if [Harden] would have returned there and just went (sic) back to his trailer and called it a night that would have been good enough." Appellant responded. "Yeah…you're probably right." 9 RR 45, L. 276-79.

"At the [Fourth Amendment's] very core stands the right of a man to retreat to his own home and there be free from unreasonable government intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961). Appellant, who held a position of authority over Officers Harden, Shannon, and Latta, had the option to de-escalate the situation lawfully. He could have instructed Shannon to holster her taser; he could have instructed Harden to let go of Nutt's door and apply for a warrant based on probable cause.[40] Rather than preserving Cory Nutt's right to be secure in his own home from unreasonable search and seizure, Appellant chose instead to compound the unlawful and dangerous actions of subordinate officers by trespassing on Nutt's residence and subjecting him to unlawful arrest.

Since there was ample evidence from which a rational juror could reasonably infer that Appellant knew his actions were unlawful and not justified by exigent circumstances, the Court of Appeals did not err in affirming his convictions.

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[40] Schumacher testified that "[T]he chief of police has occupational oversight of his officers. He shows up at the scene in a leadership command and control capacity...He can say, 'Officer Shannon, holster your taser gun. Officer Harden, step back from that door." 5 RR 101.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the State prays the Court, upon consideration of the arguments of Counsel and submission of the case to the Court, overrule and deny Appellant's single ground for review and all grounds fairly included therein, and AFFIRM the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that the pertinent portion of this brief, contains 12,116 words according to the Microsoft Word 2016 word count tool, excluding the caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, signature, proof of service, certification, certificate of compliance, and any appendix. The body text is printed in Times New Roman 14-point font, and footnotes are printed in Times New Roman 12-point font.

/s/ R. Blake Ewing
R. Blake Ewing
Assistant District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true copy of the above and foregoing instrument, together with this proof of service thereof, has been forwarded on the 29th day of April, 2021, to John G. Jasuta and David A. Schulman, Attorneys for Appellant, by email at lawyer1@johnjasuta.com and zdrdavida@davidschulman.com, respectively, or via the electronic service function provided by the efiletexas.gov website.

/s/ R. Blake Ewing
R. Blake Ewing
Assistant District Attorney

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